Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Introduction of New Advanced Mobile and Fixed Terrestrial Services; Use of Frequencies Below 3 GHz	)	ET Docket Nos. 00-258 and 95-18; IB Docket No. 99-81
	)	
Petition for Rulemaking of the Cellular Telecommunications & Internet Association Concerning Reallocation of 2 GHz Spectrum for Terrestrial Wireless Use	)	RM-

To: The Commission

REPLY OF THE CELLULAR TELECOMMUNICATIONS & INTERNET ASSOCIATION

The Cellular Telecommunications & Internet Association ("CTIA") hereby replies to the comments on its Petition for Reconsideration submitted on October 16, 2001 in this proceeding.[1] That filing seeks reconsideration of the denial of CTIA's Petition for Rulemaking to reexamine the entire 70 MHz Mobile Satellite-Service ("MSS") allocation in the 2 GHz band.[2] Of the parties submitting initial comments on the Petition for Reconsideration, only the Boeing Company ("Boeing") and Globalstar, L.P. ("Globalstar") opposed the petition.[3] For the reasons

[1] *See* 47 C.F.R. §§ 1.429(g), 1.4(h); *see also* Petition for Reconsideration of the Cellular Telecommunications & Internet Association (Oct. 15, 2001) ("Petition for Reconsideration").

[2] *See* Petition for Rulemaking of the Cellular Telecommunications & Internet Association (May 18, 2001) ("Petition for Rulemaking").

[3] *See* Opposition of the Boeing Company in ET Docket No. 00-258 *et al*. (Nov. 19, 2001) ("Boeing Opposition"); Opposition of Globalstar L.P. in ET Docket No. 00-258 *et al*. (Nov. 19, 2001) ("Globalstar Opposition"). Both AT&T Wireless and Cingular Wireless submitted comments in support of the CTIA petition. *See* Comments of AT&T Wireless Services, Inc. in ET Docket No. 00-258 *et al*. (Nov. 19, 2001) ("AT&T Wireless Comments"); Comments of Cingular Wireless LLC in ET Docket No. 00-258 *et al*. (Nov. 19, 2001) ("Cingular Comments").

stated below, these oppositions should be rejected. Not only is the Petition for Reconsideration fully ripe for consideration, grant of the petition is warranted on procedural grounds and on the merits.

I. THE CTIA PETITION IS RIPE FOR CONSIDERATION

Despite the clear language in the *Advanced Services Further Notice* denying CTIA's petition "insofar as it requests reallocation of the entire 2 GHz MSS band and a delay in authorizing of 2 GHz MSS systems,"[4] Boeing and Globalstar contend that CTIA has "essentially obtained" the relief it originally sought.[5] Boeing and Globalstar note that the *Advanced Services Further Notice* asked for comment on the possible reallocation of *some* of the spectrum, and did not explicitly preclude comment on CTIA's request to reallocate *all* of the spectrum. According to Boeing, several parties did provide "preliminary views" on the request.[6] As a result, both Boeing and Globalstar argue that the CTIA Petition for Reconsideration should be dismissed as moot.[7]

CTIA has not received the relief it sought. Therefore, the issues raised in its Petition for Reconsideration (and the underlying Petition for Rulemaking) remain ripe for consideration. CTIA sought a delay in licensing 2 GHz MSS applicants to allow the FCC to consider in a reasoned manner whether the entire 70 MHz allocation remained warranted given (i) new evidence by applicants that MSS as a whole was not viable, (ii) the ongoing financial failings of

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[4] *Introduction of New Advanced Mobile and Fixed Terrestrial Wireless Services; Use of Frequencies Below 3G*, ET Docket Nos. 00-258 and 95-18 and IB Docket No. 99-81, *Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, 16 F.C.C.R. 16043, 16055 (2001) ("*Advanced Services Further Notice*").

[5] *See* Boeing Opposition at i; *see id.* at 3-4; Globalstar Opposition at 3.

[6] *See* Boeing Opposition at 6.

[7] *See* Boeing Opposition at i; 3-5; Globalstar Opposition at 3.

many applicants, and (iii) competing CMRS needs.[8] Instead, the International Bureau ("Bureau") granted the pending applications before addressing the CTIA petition,[9] which the FCC perfunctorily denied in the *Advanced Services Further Notice* adopted several weeks later.[10]

The fact that some spectrum remains under consideration in the *Advanced Services Further Notice* for possible reallocation does not equate to reexamination of the entire band (which the FCC explicitly rejected) and does not correct the unreasoned "cart before the horse" decisionmaking the Petition for Rulemaking sought to avoid. The only way to correct this error is to grant the CTIA petitions and the relief requested in the Application for Review of the *License Orders*.[11] Moreover, even though some parties provided "preliminary views" on CTIA's request, it is unknowable what kind of record would have been produced (and who would have commented) if the Commission had properly sought comment on whether to delay licensing and reallocate the entire band.

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[8] *See* CTIA Petition for Reconsideration at 2; CTIA Petition for Rulemaking at 2-5. The competing spectrum needs of terrestrial mobile carriers have been amply demonstrated. *See, e.g.*, Joint Comments of Cingular Wireless and Verizon Wireless in IB Docket No. 01-185 at 20-23 (Oct. 22, 2001).

[9] *See ICO Services Limited,* DA 01-1635 (IB & OET July 17, 2001) ("*ICO Services*"), *app. rev. pending*; *see also Boeing Co.,* DA 01-1631 (IB July 17, 2001), *app. rev. pending*; *Celsat America, Inc.,* DA 01-1632 (IB July 17, 2001), *app. rev. pending*; *Constellation Communications Holdings, Inc.,* DA 01-1633 (IB & OET July 17, 2001), *app. rev. pending*; *Globalstar, L.P.,* DA 01-1634 (IB & OET July 17, 2001); *Iridium LLC,* DA 01-1636 (IB July 17, 2001), *app. rev. pending*; *Mobile Communications Holdings, Inc.,* DA 01-1637 (IB & OET July 17, 2001), *app. rev. pending*; *TMI Communications and Co., Limited Partnership,* DA 01-1638 (IB July 17, 2001) , *app. rev. pending* (collectively, the "*License Orders*").

[10] *See Advanced Services Further Notice*, 16 F.C.C.R. at 16055.

[11] *See* Application for Review of AT&T Wireless Services, Inc., Cellco Partnership d/b/a Verizon Wireless, and Cingular Wireless LLC (filed Aug. 16, 2001) ("Application for Review"); Cingular Comments at 1-2; *see also* AT&T Wireless Comments at 4 & n.15.

II. GRANT OF THE CTIA PETITION IS WARRANTED ON PROCEDURAL GROUNDS

On procedural grounds, Boeing claims that public notice was not required and denial was warranted because CTIA did not satisfy Section 1.401(e)'s prohibition against moot, premature, repetitive or frivolous petitions.[12] Boeing also asserts that the explanation given for the denial in the *Advanced Services Further Notice* was reasonably clear and did not exceed bounds of harmless error because (i) the entirety of the record supported the action, and therefore the lack of more detailed information is immaterial; (ii) the *Advanced Services Further Notice* "clearly" and "specifically" incorporates by "explicit reference" and "adopts the reasoning of" the *License Orders*.[13] Neither argument withstands scrutiny.

First, the suggestion that public notice was not required and denial of the Petition for Rulemaking was appropriate because of the exceptions in subsection (e) of Section 1.401 (moot, premature, repetitive, frivolous) appears nowhere in the *Advanced Services Further Notice*, and therefore is nothing more than an impermissible *post hoc* rationalization.[14] The only reasons given for the denial in the *Advanced Services Further Notice* were consistency with the public

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[12] *See* Boeing Opposition at 7; *see also id*. at 5 & n.17; Globalstar Opposition at 4. Section 1.403 of the Commission's rules states that "[a]ll petitions for rule making . . . meeting the requirements of § 1.401 will be given a file number and, promptly thereafter, a 'Public Notice' will be issued." 47 C.F.R. § 1.403. Section 1.401(e) states that "[p]etitions which are moot, premature, repetitive, frivolous, or which plainly do not warrant consideration by the Commission may be denied or dismissed without prejudice to the petitioner." 47 C.F.R. § 1.401(e).

[13] *See* Boeing Opposition at ii, 8.

[14] As the Supreme Court has made clear, courts may not accept "*post hoc* rationalizations for agency action." *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962); *see SEC v. Chenery Corp*., 332 U.S. 194, 196 (1947); *Trinity Broadcasting v. FCC*, 211 F.3d 618, 632 (D.C. Cir. 2000); *Graceba Total Communications, Inc. v. FCC*, 115 F.3d 1038, 1041 (D.C. Cir. 1997); *Cincinnati Bell Tel. Co. v. FCC*, 69 F.3d 752, 763 (6th Cir. 1995).

interest and the *License Orders*.[15] In any event, the petition was not moot when filed because the licenses had not yet been issued,[16] and is not moot today for the reasons stated above. Moreover, there is no particular time period for filing petitions for rulemaking and, in any event, the petition was filed shortly after applicant admissions of MSS nonviability – a new circumstance postdating the Commission's allocation orders – first surfaced in March 2001.[17] Therefore, none of the other factors in subsection (e) are implicated. It is axiomatic that the Commission must follow its own rules.[18]

Second, the failure to provide a reasoned basis for the denial is not harmless. The agency must clearly articulate the basis for its decision by providing a "rational connection between the facts found and the choice made."[19] Here, the FCC has made a choice to deny the Petition for Rulemaking, but has failed to identify record support for its choice.[20] Its failure to compile a record on the petition precluded it from making a reasoned decision in the first instance and is therefore fatal.[21] Moreover, the *Advanced Services Further Notice*'s statement that the denial

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[15] *See Advanced Services Further Notice*, 16 F.C.C.R. at 16055.

[16] *See, e.g.*, AT&T Wireless Comments at 2-3.

[17] *See infra* note 36 and accompanying text.

[18] *See* CTIA Petition for Reconsideration at 4 & n.8 (citing cases); *see also* AT&T Wireless Comments at 1-2.

[19] *Motor Vehicle Manufacturers Association v. State Farm Mutual Insurance Co.,* 463 U.S. 29, 43 (1983); *see Burlington Truck Lines*, 371 U.S. at 168; *AT&T Wireless Services, Inc. v. FCC*, No. 00-1304, slip op. at 15 (D.C. Cir. Nov. 9, 2001); *United States Telecom Association v. FCC,* 227 F.3d 450, 460-62 (D.C. Cir. 2000); *City of Brookings Municipal Telephone Co. v. FCC,* 822 F.2d 1153, 1167-69 (D.C. Cir. 1987).

[20] Mere invocation of the public interest without more is insufficient. *See* CTIA Petition for Reconsideration at 5 & n.12 (citing cases).

[21] Even assuming, *arguendo*, the existing record supported the FCC's action as Boeing suggests, the decision is void of citations to the record to support this hypothesis. As the U.S. Court of Appeals for the D.C. Circuit has noted, "[i]t is not the task of a reviewing court to
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was "consistent with the . . . recent action granting the 2 GHz MSS authorizations"[22] does *not* clearly incorporate by reference the reasoning of the *License Orders* as Boeing advocates. Even if it did, those orders do nothing more than cite to outdated public interest findings in the allocation orders issued before the admissions of Motient and New ICO.[23]

III. GRANT OF THE CTIA PETITION IS WARRANTED ON THE MERITS

On the merits, Boeing contends that the denial of the Petition for Rulemaking was reasonable because (i) there is no support for the proposition that a Bureau cannot issue licenses before resolving a petition for rulemaking; and (ii) the only allegations regarding viability of "certain" MSS applicants come from a single 2 GHz MSS applicant, an irrelevant L-band operator (Motient), or third parties, none of which is corroborated.[24] Globalstar likewise states that CTIA focuses "on the marketing difficulties of a few MSS companies and extrapolates from those vignettes its hypothesis that no spectrum is needed for MSS as a service."[25] According to Globalstar, CTIA offers "no reason" why the Commission's prior finding that a 70 MHz MSS allocation serves the public interest is in error.[26]

CTIA does not contend, as Boeing suggests, that the Bureau can *never* issue licenses before resolving a petition for rulemaking. CTIA contends that *in this case*, based on the facts before the Commission prior to licensing, it was not reasoned decisionmaking to decline to

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'rumage' through the record in search of a basis upholding the Commission's conclusion." *City of Brookings,* 822 F.2d at 1168 (citing *Connecticut Power & Light Co. v. NRC*, 673 F.2d 525, 534-35 (D.C. Cir. 1982)).

[22] *Advanced Services Further Notice*, 16 F.C.C.R. at 16055.

[23] *See* CTIA Petition for Reconsideration at 7-8; *see also* Cingular Comments at 2-4.

[24] *See* Boeing Opposition at 12-13.

[25] Globalstar Opposition at 5.

[26] Globalstar Opposition at 4.

initiate a rulemaking to reexamine the 70 MHz allocation where admissions by applicants that MSS was not viable directly undermined the predicate for the original allocation.[27] It was also not reasoned to wait to address a petition seeking reexamination of the entire band until *after* the vast majority of that spectrum had been licensed without resolving the critical issue raised by CTIA concerning the viability of the industry.[28] And it was not reasoned decisionmaking to ignore evidence of nonviability in favor of allowing MSS to succeed or fail on its own merits, and weeks later propose in the *Flexible Use Notice* to intervene in the market to make MSS commercially viable.[29]

The attempts by Boeing and Globalstar to downplay the evidence are unavailing. First, the evidence of the financial failings of many MSS applicants is well reported and uncontroverted.[30] Second, the viability of the MSS industry as a whole (not just certain carriers) was challenged by MSS applicants themselves,[31] not third parties. Third, the fact that one of

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[27] *See* CTIA Petition for Reconsideration at 9 & nn. 24-25 (citing cases).

[28] *See* CTIA Petition for Reconsideration at 6-7. In this regard, while *Ashbacker* and *Community Broadcasting* are factually distinguishable, they were cited for their cautionary guidance regarding the dangers of prejudgment. *See* Petition for Reconsideration at 6-7 n.16. In this case, by making licensing decisions that parsed out most of the spectrum at issue in CTIA's petition without first considering the merits of the petition, the Bureau prejudged the outcome. The FCC's decision to then deny the petition simply to ensure consistency with the *License Orders* means that the FCC did not adequately consider the merits of the petition. This is not reasoned decisionmaking. *See United States Telecom Association,* 227 F.3d at 461 ("Fundamental principles of administrative law require that agency action be 'based on a consideration of the relevant factors,' . . . and rest on reasoned decisionmaking in which 'the agency *must examine the relevant data* and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made . . . .'") (emphasis added) (citing cases).

[29] *See* Cingular Comments at 5.

[30] *See id*. at 3 & n.8 (citing support).

[31] *Ex Parte* Letter from Lawrence H. Williams and Suzanne Hutchings, New ICO Global Communications (Holdings) Ltd., to Chairman Michael K. Powell, Federal Communications Commission, IB Docket No. 99-81, at 5-6 (March 8, 2001); Application filed by Motient
(continued on next page)

those applicants (Motient) is not a 2 GHz MSS licensee arguably renders its comments that much *more* persuasive, as they are the impartial comments of an MSS licensee and not a third party.[32] And fourth, evidence of nonviability and inefficient spectrum use has been further corroborated by statements of other MSS operators in the *Flexible Use* proceeding.[33]

Significantly, Globalstar itself recently announced its intent to file for bankruptcy – a fact unreported in its opposition.[34] Globalstar's decision to seek bankruptcy protection cannot be fairly characterized as "mere marketing difficulties" and just adds to the evidence that MSS is not viable. In fact, by refusing to decide the viability issue prior to licensing, the FCC may be in

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Services Inc. and Mobile Satellite Ventures Subsidiary LLC for Assignment of Licenses and for Authority to Launch and Operate a Next-Generation Mobile Satellite Service System, at 12-13 (filed March 1, 2001).

[32] Moreover, Motient just announced after receiving regulatory approval that it will complete the consolidation of its satellite business with that of a 2 GHz MSS operator, TMI Communications and Company, L.P. *See* Motient Corporation, Press Release, *Motient and TMI Communications Complete Consolidation of Mobile Satellite Business* (Nov. 27, 2001).

[33] *See Flexibility for Delivery of Communications by Mobile Satellite Service Providers in the 2 GHz Band, the L-Band and the 1.6/2.4 GHz Band; Amendment of Section 2.106 of the Commission's Rules to Allocate Spectrum at 2 GHz for Use by the Mobile Satellite Service*, IB Docket No. 01-185 & ET Docket No. 95-18, *Notice of Proposed Rulemaking*, FCC 01-225 (rel. Aug. 17, 2001) ("*Flexible Use Notice*"); *see* Cingular Comments at 6 & n.25.

[34] *See* Cingular Comments at 6 & n.26. For example, Globalstar's bondholders admit that, as licensed (*i.e*., in the absence of terrestrial authority), "it is unlikely that Globalstar will be able to raise sufficient capital to launch its second generation satellite constellation." Unofficial Bondholders Committee of Globalstar, L.P. Comments in IB Docket No. 01-185 *et al*. at v (Oct. 19, 2001). Even Celsat, which claims to have formulated its business plan without reliance on terrestrial authority, acknowledges that MSS spectrum will be underutilized as licensed: "[E]ven if . . . alternative arrangements [with terrestrial wireless carriers] could be made, *the 2 GHz MSS band would remain underutilized absent terrestrial reuse*. . . . In short, terrestrial reuse simply provides the satellite service provider with another option to reach the consumer and, without it, the *spectrum will lie fallow* since only the satellite operator can coordinate terrestrial reuse of the spectrum." Celsat Comments in IB Docket No. 01-185 *et al*. at 8-9 (Oct. 19, 2001) (emphasis added).

a powerless position to retake spectrum from a licensee that fails to meet its construction milestones if that licensee – like Globalstar – seeks protection under the bankruptcy laws.[35]

Finally, Globalstar incorrectly states that CTIA offers no reason why the Commission's prior finding that a 70 MHz MSS allocation serves the public interest is erroneous. On pages 7-10 of its Petition for Reconsideration, CTIA explains that the public interest basis for allocating 70 MHz to MSS was the belief that MSS would provide service to rural and underserved areas, and that this predicate has been undermined by the subsequent events, *e.g.*, statements by applicants themselves that MSS as licensed is not viable.[36]

[35] *See NextWave Personal Communications, Inc. v. FCC*, 254 F.3d 130 (D.C. Cir. 2001), *pets. for cert. pending*. The FCC's refusal to decide this issue while moving ahead with licensing and the *Flexible Use* proceeding also violates Section 309(j) of the Communications Act. *See* Petition for Reconsideration at 9-10.

[36] *See* Petition for Reconsideration at 7-10.

CONCLUSION

For the reasons set forth above, the Commission should grant CTIA's Petition for Reconsideration and seek full public comment on the entirety of its Petition for Rulemaking. Given the prejudicial licensing actions taken immediately prior to denying the Petition for Rulemaking, the Commission should also grant the Application for Review of the *License Orders* while holding the *Flexible Use* proceeding in abeyance to allow the Commission to fully consider the issues raised by CTIA in a reasoned manner.

Respectfully submitted,

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December 4, 2001

CERTIFICATE OF SERVICE

I, Ernestine M. Screven, hereby certify that pursuant to Section 1.429(g) of the Commission's rules, copies of the foregoing have been served this 4th day of December, 2001, by first class United States mail, postage prepaid, on the following:

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